

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DAVID DOUGLAS,

Claimant,

v.

EXCEL TRANSPORT, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

**IC 03-504004**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed: August 15, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Sandpoint, Idaho, on August 26, 2004. Joseph Jarzabek of Sandpoint represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence. The record was held open for the taking of post-hearing depositions. The depositions were subsequently vacated and the parties submitted post-hearing briefs. The matter came under advisement on May 24, 2005 and is now ready for decision.

**ISSUE**

By agreement of the parties at hearing, the sole issue to be decided is:

1. Whether Claimant had a work-related accident on or about February 13, 2003.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that on the evening of February 13, 2003, he was shoveling wood chips out of an overloaded trailer at Stimson Lumber in Priest River when he sustained an injury to his low back.

Defendants argue that Claimant's back injury actually occurred on Sunday, February 2, 2003—a day Claimant did not work—when he was loading propane tanks into his personal vehicle.

Claimant admits that he injured his neck tying down propane tanks on February 2, and that he missed work on Monday, February 3, and Tuesday, February 4, as a result of that incident. Claimant avers, however, that the neck injury resolved within a couple of days and was unrelated to the low back injury he sustained at work on February 13.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Howard Graves, Stuart Lawson, Rick Voorhies, John Albrich, Becky Douglas, and Claimant offered at hearing;
2. Claimant's Exhibits 1 through 17, including the original transcript of Howard Graves' deposition and a copy of Claimant's deposition transcript;
3. Defendants' Exhibits A through G, including the original transcript of Claimant's deposition; and
4. The Industrial Commission legal file.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 2**

## **FINDINGS OF FACT**

1. Claimant went to work for Employer as a truck driver on February 7, 2000. His job was to haul wood waste (sawdust, chips, bark, etc.) from mills in the Priest River area to the Potlatch paper production facility in Lewiston.

2. Claimant worked the swing shift, Monday through Friday, and generally started his shift around 8:00 p.m. Because the output from the mills varied, there was frequent communication between drivers and dispatch so that trucks could be dispatched as needed and long waits for a load could be avoided. Claimant would either be told the day before what time he was needed the next day, or he would call Employer's dispatch office at about 2:00 p.m. to find out what time he was needed that evening. Ordinarily, Claimant would pick up a tractor-trailer at Employer's Post Falls terminal. When he picked up the tractor-trailer, he would be told at which Priest River mill he was to load, as well as what product he would be loading. When Claimant arrived at the designated mill, he would load his trailer and then weigh it on the mill's scale. Maximum legal weight for Employer's tractor-trailers was 104,000 lbs.<sup>1</sup> Claimant would drive the load to Potlatch in Lewiston where the tractor-trailer would be weighed in on Potlatch's scale, and a weight ticket issued. The trailer would be emptied, and the driver would return to the Post Falls terminal or to a location directed by dispatch.

3. If a driver overloaded his trailer, he would have to reduce the load to a legal load before heading to Lewiston. This was done in several ways, depending upon the mill at which the driver was loading. At Stimson Lumber, excess product was removed from the trailer into a pile at the Stimson yard. The method for removing excess product depended upon the type of

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<sup>1</sup> The record is not clear whether the 104,000-pound weight limit applied just to the load, the trailer plus the load, or the combined weight of the tractor-trailer and load. The Referee takes judicial notice of Idaho Code § 49-1001, which provides that weight limitations are based on the gross combination weight of the vehicle, which includes the tractor-trailer together with the load.

trailer that was used. Some trailers would unload themselves, others required that the driver shovel or scoop out the overload.

4. When a driver loaded a trailer at a mill, he would check all product bins, and make a “loaded call” to provide that information to the dispatcher or to the lead man (the person who acts as dispatcher after the afternoon dispatcher had gone home). Once a driver had unloaded at Potlatch, he was to make an “empty call” to dispatch or the lead man.

5. A driver could make one complete run—pick up a tractor-trailer in Post Falls, drive to Priest River, load the trailer, drive to Lewiston, unload, and return to Post Falls—during an ordinary shift.

6. The dispatchers maintain a computerized dispatch log that identifies the time a driver came to work, which truck the driver had, the route the driver took (where he loaded and where he unloaded), and the type of load. In addition to this computerized dispatch log, the dispatchers kept running note of other pertinent events and information on a legal pad. Each dispatcher could look at the notes on the legal pad and find out what had occurred on the previous shift.

### ***THE PROPANE TANK INCIDENT***

7. On Sunday, February 2, 2003, Claimant sustained an injury in the process of refilling the propane tanks used to heat his home. According to Claimant, he was tying down the filled tanks when he felt a burning pain in his neck and right shoulder. Claimant continued what he was doing and took the tanks home. The next day, Monday, February 3, Claimant awoke with a stiff neck; he could not turn his head without turning his torso. Believing it was not safe to drive in this condition, he called Employer’s dispatcher to ask for the night off. At hearing, Claimant testified as follows:

### **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 4**

And so I called and told Stuart [Lawson] I pulled a muscle up in the shoulder blade in my neck—shoulder area. And I can't turn my head, and I don't feel safe to be driving. And I asked for the night off.

And he gave me the night off. And the next day I called Ron [Wright] and told him my neck is still stiff and told him I wasn't going to make it in. And that was it. The following day I was feeling a lot better. Went back to work.

Tr., p. 139. Claimant's wife corroborated Claimant's testimony that he injured his neck and missed work for a couple of days. Claimant's wife described a slightly different mechanism of injury, stating that "he was lifting up a small propane tank, barbecue size, and strained a muscle in his neck." *Id.*, at p. 166.

8. Stuart Lawson, the afternoon dispatcher, testified that he took a call from Claimant on Monday, February 3, in which Claimant stated that he had hurt his lower back throwing a propane bottle into the back of his pickup. Lawson testified that he and Claimant discussed the nature of the injury because Lawson had also experienced pulled muscles in his lower back. Lawson stated that he noted the information on the informal log:

I wrote down Dave Douglas called me – I always write the date – called me at – I don't remember the exact time. But I write down the time. And Dave said that he threw a propane bottle in the back of his pickup, and he felt pain in his lower back.

*Id.*, at p. 54. Lawson testified that he told Howard Graves about the incident the following day.

Lawson also stated that the day dispatcher, Ron Wright, was aware of the incident by February 4 because he had seen Lawson's notes from the previous evening.

9. Rick Voorhies, lead man, was also asked about the propane tank incident during the hearing. He testified that he recalled that Claimant had called in sick for a couple of days at the beginning of February 2003—he noticed on the informal log that Claimant was out and asked Lawson about it, and Lawson told him that Claimant had called in because he hurt his back. Voorhies also remembered seeing Claimant walking around the office like he was stiff.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 5**

10. Howard Graves, personnel director and safety manager, testified that he had no personal knowledge about the propane tank incident, but was aware of it the day after Claimant first missed work. Graves observed that Claimant had not turned in a log for the previous day so he asked the dispatcher if Claimant had worked. The dispatcher told Graves that Claimant had called in sick because of the propane tank incident. Graves stated that he had seen the notation on the informal log referencing Claimant's lower back injury.

11. Employer's official dispatch log for February 3 shows Claimant as "off sick." Defendants' Ex. B, p. 1. The dispatch log for February 4 shows Claimant as "off." *Id.* at p. 2.

### ***FEBRUARY 13, 2003 INCIDENT***

12. On Thursday, February 13, 2003, Claimant arrived at the Post Falls terminal a little before 8:00 p.m. Stuart Lawson dispatched Claimant to Stimson Lumber to pick up a load of chips. Claimant testified that before he picked up his load at Stimson Lumber he checked the bins at J. D. Lumber.

### **Claimant's Deposition Testimony**

13. Claimant loaded his trailer with wood chips and weighed on the Stimson scales. Claimant testified that he was about 3,000 lbs. over legal weight. The scales in the Stimson yard are unattended, so no weight receipt is provided. Nothing in the record indicates that the loaded weight is recorded in any permanent form. At Stimson Lumber, overweight loads are legalized by unloading the excess into a pile in the Stimson yard. Claimant testified that he got permission from a foreman at Stimson to unload onto the pile and started to shovel out the excess chips. Claimant testified that he was almost done unloading the excess product when he felt a sharp pain in his low back; he immediately stopped shoveling, and took a break. Claimant testified that he used the phone at Stimson Lumber to call Rick Voorhies, the lead man:

Q. [By Mr. Augustine] And what did you tell Mr. Voorice? [sic]

A. I told him that I hurt my back shoveling it off. I told him I wasn't finished. That I wasn't going to be able to finish. And I asked him if I could leave [the trailer], and he said I couldn't leave it. That he needed me to run it down. I guess all of our trailers were full or something.

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Q. Now, when you say – what did you specifically tell him about your back?

A. I told him exactly what I did. I was shoveling it off, and I felt something sharp in my back. I don't know what I did.

Q. Did you tell him that you felt that you could not finish shoveling off the load?

A. Yes. I told him I wasn't going to. I couldn't.

Claimant's Depo., pp. 59-60.

14. Claimant drove the load to Potlatch in Lewiston, believing it was still about 300 lbs. overweight.

A. . . I unloaded my trailer and then I called Rick [Voorhies] back, and I let him know that I wasn't going to be able to do anything else for him.

Q. [By Mr. Augustine] Did you tell him why?

A. Yes.

Q. What time did you call Rick back?

A. That was about – I'm guessing – it was around 2:00. I can't recall the exact time, but it was around 2:00, 2:30. Somewhere in there.

Q. In the morning?

A. Yes, a.m.

\* \* \*

Q. And what did he tell you?

A. He told me that was fine.

*Id.*, pp. 64-66.

15. Claimant stated that he drove the tractor-trailer back to Post Falls, reaching the terminal about 5:00 a.m. and arriving home around 5:45 a.m. Claimant believed the next day was a Saturday. He stated that he rested all weekend, but his back got worse. Claimant called Lawson on Monday afternoon with the acknowledged intent of not working that evening:

And then I called in that next Monday. And I told Stewart [sic] that I was still pretty sore from the night before. And I asked him if Rick had reported it to him. And he said Rick had mentioned something to him. And I was trying not to go into work that night, but Stewart [sic] really needed me, so I went into work that night.

*Id.*, at p. 69. Claimant drove a load to Lewiston. He thought it was a pre-load (when a bin at a mill is getting full and there isn't a driver available, the lead man will pick up a trailer and load it from the bin, and return it to the terminal, so that the next driver just hitches up and takes the load to its destination). Claimant testified that he had a hard time getting out of his truck when he reached Lewiston. He unloaded the truck and called Voorhies and told him that he was worse and was going to see a doctor the following day (Tuesday). He drove back to Post Falls and left the tractor-trailer at the terminal. He testified that when he got home he had to crawl from his vehicle to his front door and wake his wife to let him in. He saw a doctor later that day and then went to the dispatch office where he met with Howard Graves. Also present were Lawson and Voorhies. Claimant and Graves filled out an incident report. Claimant told Graves that he had reported the incident to Lawson. There was some uncertainty whether Lawson had noted the incident on the informal dispatcher's information log. Claimant reported that Voorhies said nothing during the informal gathering.



## **Claimant's Hearing Testimony**

16. Claimant's hearing testimony was fairly consistent with his deposition testimony except in the following respects. At hearing, he correctly noted that February 13, 2003 was a Thursday. He stated he was scheduled to work at 8:00 p.m. on Friday. He called Lawson that afternoon and told him what had happened. Claimant felt he could work, and Lawson said he needed him to work, so Claimant went to the terminal at his usual time.

17. Claimant stated that Lawson and Voorhies were both in the dispatch office when he got there, and Claimant told Lawson what had happened, including that he'd reported the incident to Voorhies the night before. Claimant took the load to Lewiston. He stated that he was stiff when he arrived home. He rested all weekend.

18. On Monday, February 17, Claimant called dispatch and spoke to Lawson:

Well, I called Stuart and told him that I was hurting real bad. I couldn't come into work. And it was the same deal. He begged me to come in. He needed drivers. He was short on drivers. He had a lot of loads. So I went into the office and figured I'd talked [sic] to him in the office and explain to him that I was hurting.

And Stuart's comment to me was I'm not as young as I used to be, and I needed to be careful. And he dispatched me out.

Tr., p. 146. At hearing, Claimant could not recall for certain what his load was on that Monday night, but believed that it was a pre-load and that he took it to Lewiston. Claimant testified that he hurt so much that he drove standing up part of the way and had difficulty getting out of the tractor when he arrived at Potlatch. After dumping his load, Claimant called Voorhies and told him that he couldn't do any more than night—he was hurting too much. According to Claimant, Voorhies tried to give him another load anyway. Claimant headed back to Post Falls, but stopped along the way and called Voorhies:

I called Rick from a pay phone and said, "I cannot haul another load. I'm hurting too bad." I'm going home. I need to go to a doctor tomorrow."

*Id.*, at pp. 147-148. Claimant returned the tractor-trailer to the terminal, skipping the post-trip check of the equipment. When he arrived home he had to crawl to the door and wake his wife to let him in.

19. At hearing, Claimant also testified about preparing the incident report:

Q. [By Mr. Jarzabek] Can you tell the Commission what you recall about that meeting—where it took place, who was present, that type of thing?

A. It took place in the dispatch office. I called Howard [Graves] before I left and told him I needed to fill out an incident report and talked to him about it. So he met me at the dispatch office. Stuart was in the office dispatching, and Rick Voorhies had just come in so they were both in the office present, and I filled out the incident report.

And Howard asked Stuart if I reported it, and he goes, “I’m not sure.” And he looked at the sheet and said, “Yeah, I wrote down something.” And I made the comment to Stuart that, “You know I reported it to you because you told me I’m not as young as I used to be. I’ve got to be careful.” So we finished filling out the incidents [sic] report.

*Id.*, at p. 149.

### **Other Witness Testimony About the February 13 Incident**

20. Howard Graves. Mr. Graves first heard about the February 13 incident on February 18, the day Claimant came in to fill out the incident report. Graves stated that he had begun to reprimand Lawson and Voorhies for not immediately informing him about Claimant’s February 13 injury, as was standard procedure. Both men claimed that they had only just learned about the incident themselves:

They were saying to me the reason they didn’t notify me on the date of the injury is because they, themselves, were not aware of it. I wasn’t aware of it until the day I made the form out.

*Id.*, at p. 35.

21. Stuart Lawson. With regard to the February 13 incident, Mr. Lawson testified as follows:

Q. [By Mr. Augustine] Did you ever receive a call from Rick Voorhies on February 13, 2003, about an alleged call that he received from Mr. Douglas?

A. No.

Q. Did you ever receive any information or call from Mr. Douglas on February 13, 2003, or thereafter indicating that he hurt himself shoveling off a load?

A. No.

*Id.*, at p. 72.

22. Rick Voorhies. At hearing, Voorhies disclaimed any knowledge about the February 13 incident. He denied receiving any telephone calls from Claimant on February 13 or in the days following. Mr. Voorhies testified:

A. . . . I didn't even know how he hurt his back.

Q. [By Mr. Jarzabek] When did you first find out how he hurt his back?

A. Probably maybe three months later.

Q. How did you find that out?

A. Stuart and I were talking about it.

Q. What did Stuart tell you?

A. Basically how he hurt his back by throwing a propane bottle in his truck.

*Id.*, at pp. 89-90. Voorhies also testified that if he had received a call from Claimant in which Claimant said he'd hurt his back, he would have noted it on the informal log. In response to questioning by Defendants' counsel, Voorhies also stated that it would have been unusual for Claimant to make an "empty call," so he would have remembered it if Claimant had done so on or after February 13.

### **Other Evidence Concerning February 13 Incident**

23. Defendants' Ex. B is a "Lost Revenue Report" for the period from January 1, 2003 through May 31, 2004. This report includes a great deal of information useful to Employer. Particularly relevant to the question at bar, the report identifies the mill where material is loaded, its destination, the batch date (the date that the weight receipt was entered into the computer), the driver, and the gross and net weight of the tractor-trailer when weighed at its destination, and the weight of the product delivered. Ex. B includes the following information pertinent to Claimant:

<b>Batch Date</b>	<b>Destination</b>	<b>Product</b>	<b>Gross Wt.</b>	<b>Tare Wt.</b>	<b>Net Wt.</b>
2/13/03	Post Falls-Priest River-Lewiston-Post Falls	Chips	103,360	32,720	70,980
2/14/03	Post Falls-Priest River-Lewiston-Post Falls	Chips	85,460	32,760	52,700
2/17/03	Post Falls-Priest River-Lewiston-Post Falls	Chips	84,700	33,540	51,160
2/17/03	Post Falls-Priest River-Lewiston-Post Falls	Sawdust	103,200	32,720	70,480
2/19/03	Post Falls-Priest River-Lewiston-Post Falls	Chips	102,000	33,000	69,000

24. The informal running log kept by the dispatchers, and referenced by many of the witnesses in their hearing and deposition testimony, was not offered into evidence and is not a part of the record of this proceeding.

### **DISCUSSION AND FURTHER FINDINGS**

#### ***ACCIDENT***

25. The issue in this case is whether Claimant had an industrial accident on February 13, 2003. Idaho Code § 72-102(17)(b) defines "accident" as follows:

"Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

The claimant in an industrial accident case has the burden of proving that an accident occurred.

A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. The claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. His proof must establish a probable not merely a possible connection between cause and effect to support his contention that he suffered an accident.

*Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). The Referee finds that Claimant has not carried his burden of proving that an accident occurred on February 13, 2003.

26. Conflicting testimony. Claimant's testimony was fairly consistent across time, as was the testimony of Graves, Lawson, and Voorhies. However, the testimony of Claimant and the other witnesses is so contradictory that it cannot be reconciled. Documentary evidence confirms that Claimant drove loads from Post Falls to Lewiston on February 13, 14 and 17, but inconsistencies are apparent, *i.e.*, Claimant took no pre-loads to Lewiston during the time in question, and the lost revenue report shows more loads delivered to Potlatch between February 13 and February 17 than are accounted for in Claimant's account.<sup>2</sup>

- Claimant testified that he had at least five conversations with Voorhies and four conversations with Lawson about the February 13 incident beginning with the first call to Voorhies from Stimson Lumber about 9:30 p.m. on February 13 and concluding with the February 17 call to Voorhies from somewhere along Highway 95 north of Lewiston.

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<sup>2</sup> The lost revenue report shows two weight tickets entered on Monday, February 17, which indicates that on Friday, February 14, Claimant took two loads to Lewiston, one chips and one sawdust.

Lawson and Voorhies denied receiving any communication from Claimant on the evening of February 13 or the days immediately following;

- Lawson and Voorhies both testified that if they had spoken with Claimant regarding an accident and injury, they would have notified Graves pursuant to Employer's reporting policy;
- Graves testified that it was Employer's policy that he be notified of any accident resulting in injury regardless of the time or place of the accident, and that he first learned of the February 13 events on February 18;
- Lawson and Voorhies both testified that the first they heard about the events of February 13 was on February 18;
- Lawson and Voorhies both testified that had they spoken with Claimant regarding an accident and resulting injury, the discussion would have been remembered as well as recorded in the informal running log;
- Voorhies testified that Claimant was generally non-compliant with the policy that drivers make an "empty call" after unloading at their destination, so he would have remembered if Claimant had made such a call on February 13 or subsequently;
- Documents identifying the weight of loads driven by Claimant to Potlatch between the dates of February 13 and February 18 do not support a claim that Claimant hauled an overweight load during the relevant period of time.

27. Credibility. The credibility of witnesses became a primary focus of this proceeding once it became clear that there were two irreconcilable versions of the events of February 13 through February 18. For the most part, the witnesses appeared credible, though Mr. Voorhies seemed a bit antagonistic, and Claimant was occasionally evasive. The Referee

cannot make a finding that any particular witness was credible or not credible, but the evidence, or lack thereof, raises troubling questions of credibility across the board:

- Why do Voorhies, Lawson, and Graves all have such clear recollections regarding the propane incident earlier in the month, but no recollection of the alleged February 13 incident?
- What happened to the informal log that the dispatchers kept regarding events that occurred on their shifts that would support or refute particular testimony?
- How could Claimant's version of events and the version of events provided by Voorhies, Lawson, and Graves lack even the most tangential points of agreement?
- If Claimant's version of events is truthful, why is there no reliable corroborating evidence?
- If Voorhies, Lawson, and Graves' version of events is truthful, why is there no reliable corroborating evidence?

Either Claimant's version of events is truthful and the current and former employees of Employer cooperatively fabricated a story, or the current and former employees of Employer are telling the truth and Claimant fabricated the story about the February 13 accident. The motivation for fabrication is equal on either side—protecting their employer, or seeking medical care that Claimant could not otherwise afford.

28. On the record herein, the Referee cannot find that either party has made a convincing case in support of their respective positions—the evidence for and against the occurrence of an accident at work on February 13, 2003 is evenly balanced. When evidence is found to be in equipoise, Claimant has failed to prove by a preponderance of the evidence he suffered an industrial accident.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 15**

## CONCLUSION OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that he had a work-related accident on or about February 13, 2003.

## RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 5 day of August, 2005.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of August, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

JOSEPH E JARZABEK  
PO BOX 1049  
SANDPOINT ID 83864-1049

PAUL J AUGUSTINE  
PO BOX 1521  
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djb

/s/ \_\_\_\_\_